Watching the Peacock Dance

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Maximilian SteinbeisFr 22 Mai 2020

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Well, if that isn't a pleasant surprise: Last year, on my way back from Bosnia, I crossed the Serbian-Hungarian border at Röszke and was able to catch a glimpse of the notorious "transit zone" from the bus window – a refugee prison in which the Hungarian government had imprisoned some 280 people, half of them children, who had committed no worse a crime than to seek asylum at this particular section of the EU's external border. This type of accommodation for asylum seekers, the ECJ ruled last week, qualifies as detention and is thereby incompatible with EU law.

Why a surprise? Because the Hungarian government has actually implemented the ECJ ruling and dissolved the Röszke camp and distributed the unjustly imprisoned to reception facilities in the country. Which is by no means as self-evident as one might think.

At the beginning of the week, the government had struck a completely different note: Viktor Orbán had accused the ECJ of being in cahoots with the European Parliament and the "bureaucrats" in Brussels in order to "trick Hungarian laws and the Hungarian constitution" and force Hungary to "have to accept migrants against its will". Using all

sorts of football metaphors, the Prime Minister had declared it "obvious" that the Luxembourg Court's verdict was "contrary to the Hungarian constitution". But then, all of a sudden: hush, not a word more about it.

I talked to a few people in Budapest to find out what they are making of this change of mind. Conclusion: This is certainly great news for the unfortunate inmates of the Röszke camp. But to assume that the Hungarian government has recognised its mistake and has now regretfully returned to the path of the rule of law – that would be naive.

The ECJ ruling was made in the context of a preliminary ruling procedure. It was a Hungarian court which had referred the case to Luxembourg and which will now decide on this basis. And to refuse to obey a Hungarian court is a pricklier matter in terms of domestic policy than to denigrate some judges in remote Luxembourg as devious, migrant-loving Soros underlings. As far as the judiciary and its independence are concerned, the Hungarian government is way more subtle than its Polish colleagues, although the judiciary in Hungary is also increasing alarmed. Only last week Hungary's Supreme Court handed down its ruling on the Gyöngyöspata case. This northern Hungarian town, notorious as the scene of right-wing extremist marches to intimidate the Roma population, had been ordered by a court in Debrecen to pay 60 Roma pupils nearly 100 million forints (ca. 280,000 euros) in compensation for the segregation and discrimination they had been subjected to as students in the Gyöngyöspata school. Orbán and his government had thereupon heaped abuse on the judges and antiziganistic slurs on the plaintiffs who, according to Orbán, just were trying to get their hands on money for which they did not have to work. Now, however, the Supreme Court has confirmed the Debrecen decision in a verdict which explicitly emphasizes the importance of judicial independence.

That Orbán is suddenly so keen to appear as paragon of rule-of-law reliability with respect to the ECJ must certainly also be seen in the context of the upcoming negotiations on the EU budget. On the one hand, he can expect a huge amount of money from the Corona recovery fund, on the other hand he has to fear the prospect of the EU making the funds conditional on rule of law adherence. "The money is the carrot, the conditionality is the stick," as one of my interlocutors put it. From Orbán's point of view, it seems wise to minimize his exposure to critique by the EU Commission, which appears rather inclined to appease the autocrat of Budapest most of the time anyway. For the same reason, Orbán may also have decided to let go of most of his quasi-dictatorial emergency powers in the Corona crisis. The fact that these emergency laws do not include a sunset clause and could hardly be lifted against Orbán's will remains as true as it is scandalous. But politically, this has become a toothless argument now.

And the ECJ? There is still the option of calling on the Hungarian Constitutional Court eventually. That Court has copied from its German counterpart how to do ultra vires and constitutional identity control vis-a-vis the Europen Union. A year ago, at the request of the Ministry of Justice, it examined whether the EU Commission's intervention against

Hungary's pushback of refugees policy was in line with Hungary's constitutional identity. (The ruling was remarkably pro-European in that the court explicitly recognised in it that it has no competence to annul EU legislation).

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And asylum law? The dissolution of the "transit zones" Röszke and Tompa is not all that has happened. The Hungarian government has also announced that in future it will no longer be possible to apply for asylum at the border at all. While Röszke used to be a kind of invagination of the external border and a de jure membrane for the intake of refugees, asylum seekers now face a seamless wall on the Serbian-Hungarian border. Those who want to apply for asylum should do so in Hungarian embassies and consulates – in other words, stay abroad and apply for a humanitarian visa which, I suppose is safe to say, will never arrive. In this way, the Hungarian government would have achieved what it has been striving for all along, namely that there is no longer any legal claim to protection on Hungarian soil. The policy of undermining the EU refugee law they had pursued for years would have reached its goal.

The week on Verfassungsblog

LENNART KOKOTT has summarized what happened on the constitution blog this week:

The discussion about the ultra-vires ruling of the Federal Constitutional Court unsurprisingly continues – but with a shift in focus that is now **on the relationship between the ECJ and the FCC** following the ruling.

A first manifestation of the disputes that may still be pending in this relationship was the discussion about possible **infringement proceedings** against the Federal Republic of Germany. INGOLF PERNICE does not reject such a procedure on principle and argues that the ECJ could thus be given the opportunity to clear up misunderstandings of its own positions – without having to push the proceedings to their extreme. SEBASTIAN LEUSCHNER, too, sees this as an opportunity to continue the dialogue between the courts on the substance of the matter, which could ultimately have a de-escalating effect and lead to a more precise definition of the standards for the handling of the identity clause of the TEU. CHRISTOPH MÖLLERS disagrees: With regard to the Commission's previous practice of initiating such proceedings, there are no reasons of principle for infringement proceedings, but it is also unclear what should follow from this institutionally. The speed and circumstances of European integration remains a politically controversial project that cannot be solved in the forms of the law, he maintains.

However, the relations between the two courts are also under scrutiny beyond the possibility of infringement proceedings. FRANCESCA STRUMIA asks how things should continue between the Federal Constitutional Court and the European Court of Justice and explains what steps can now be taken to ensure that the courts once again fully recognise each other. URŠKA ŠADL addresses the question of **mutual recognition** as well and emphasises that with its decision, in comparison to the *Ajos* judgment of the Danish Supreme Court, the FCC has denied the ECJ methodological integrity in a way that is inappropriate in the dialogue between the European courts. One way out, therefore, would be to develop a culture of methodological tolerance. KLAUS FERDINAND GÄRDITZ also considers the focus of the judgment on the methodology of the European Court of Justice to be misguided, but the analysis of the weaknesses of the European Court of Justice's decision in *Weiss* to be correct in terms of content, and emphasises that the BVerfG is concerned with the protection of **constitutional identity** against control-free governing by European institutions. It is precisely this interpretation of constitutional identity that is at the centre of PAVLOS ELEFTHERIADIS' criticism of the judgment, who has sharp words for the FCC for its use of idiosyncratic dogmatics to seal itself off from the constitutional mainstream in Europe. STEFAN BRAUM finally brings the European citizens into play: The dialogue of the courts could become a trilogue with positive effects for the harmonisation of the interpretation of basic legal principles if individual complaints before the ECJ were introduced, he argues.

Online Panel Discussion Series: The COVID-19 Crisis from a German, European and International Perspective

Session III: "Universally respected but temporarily neglected?" – COVID-19 as a crisis for human rights and multilateralism

Multilateralism and international human rights have been met with increasing scepticism

for quite some time now. So far, the COVID-19 pandemic has certainly not made international cooperation easier. But what exactly does this pandemic mean for multilateralism and the international protection of human rights? And what will international cooperation look like once the virus is under control? This panel will discuss the implications of COVID-19 in this regard and identify some lessons to be learned for the international community.

Philip Alston (NYU/ Former UN Special Rapporteur Extreme Poverty and Human Rights) – COVID-19 from the Perspective of Human Rights and Global Poverty

Marco Sassóli (Geneva Academy of IHL and Human Rights/ Université de Genève) – The COVID-19 Pandemic and its Implications for (Existing) Conflicts

Gian Luca Burci (Graduate Institute Geneva, Former Legal Counsel of WHO) – COVID-19 as an Institutional Crisis for the WHO and Multilateralism

Katrin Radtke/ Eva Johais (IFHV, Ruhr-Universität Bochum) – COVID-19 as an International Challenge for Humanitarian Governance

Nico Krisch (Graduate Institute Geneva) – International Law after COVID-19

Chair: Pierre Thielbörger (IFHV, Ruhr-Universität Bochum)

ANDREA GUAZZAROTTI refers to the macroeconomic essence of the judgement and critically positions them in the context of **sovereignty and democracy debates** in the European Union, which are rooted in the Euro crisis and in which the Federal

Constitutional Court takes an extremely hard position towards the other member states, he says. FRANCESCA BIGNAMI sees the ECJ in the right from a European law perspective, whereas the FCC has taken the wrong path of a view that is indebted only to principles of German constitutional law and does not do justice to European constitutional principles.

MARTIJN VAN DEN BRINK and HANS MICHAEL HEINIG take a look at the next proceedings in which the relationship between the courts will be discussed. They deal with the consequences of the PSPP ruling for the upcoming decision in the **Egenberger** case – while coming to different results with regard to the question whether a new *ultra vires* verdict would be justified.

HANNO KUBE looks at the **legal-political consequences of the judgement**, which according to him revealed the deficits of the current structure of the European Economic and Monetary Union and could thus trigger an overdue debate on the financing of the Union.

JANNIKA JAHN deals with the **public relations offensive** of the Federal Constitutional Court in the weeks following the judgement. In the statements of the judges Huber and Voßkuhle, as well as in an interview given by the ECJ President Lenaerts, she misses the safeguarding of judicial passivity and impartiality and states that the authority and legitimacy of the institutions involved suffer from such statements.

In In Corona Constitutional #26, WOLFGANG KALECK talks to ALEXANDER MELZER about the FCC's ruling on the *Bundesnachrichtendienst* (Federal Intelligence Service) law issued this week that judged parts of the law to be unconstitutional and extended the fundamental rights of the *Grundgesetz* to non-citizens abroad: Civil society could breathe a sigh of relief, but should not sit back.

Apart from the younger problem child called *ultra vires*, the older one, dubbed **the rule of law in Poland and Hungary**, is troubling the European legal discourse. JOHN COTTER pleads for excluding representatives of the Hungarian government from participating in the European Council and the Council on the basis of Art. 10 (2) TEU. This would be justified by the lack of democratic accountability of the Hungarian government and would also have the advantage of enabling proceedings against Poland, he argues. DÁNIEL KARSAI also deals with the role of the Hungarian Parliament in a system of checks and balances, stating (in response to IMRE VÖRÖS) that the parliament indeed has the capacity to roll back government measures during the state of danger. The problem, he says, is manifested by the combination of the current abundance of governmental powers and the reluctance of the majority in parliament to exercise its control function. In Poland, it is the control function of the judiciary, the efficiency of which is likely to be significantly linked to the filling of the presidential post at the Supreme Court, that is looked at this week. MAX STEINBEIS talks about this with ANNA WÓJCIK in Corona Constitutional #27. ALEKSANDRA KUSTRA-ROGATKA recapitulates the postponement of the presidential elections in Poland, shows the blatant unconstitutionality of the process and sets out what the opposition should now work towards.

JALALE GETACHEW BIRRU also addresses the problems that **elections in the pandemic** pose, presenting constitutional problems of postponing the parliamentary elections in Ethiopia and discussing possible solutions. MATTHIAS FRIEHE looks ahead to the preparation and conduct of next year's parliamentary elections in Germany and warns against tinkering with the electoral law apart from the necessary measures.

MAXIMILIAN STEINBEIS talks to SVEN JÜRGENSEN in Corona Constitutional #25 about questions of party law arising from the exclusion of Andreas Kalbitz from the far-right *Alternative für Deutschland* and the political implications of this process.

In light of the discussions about the measures against the Covid-19 pandemic, MARIA CAHILL takes a step back, assesses the **concept of freedom** and works out why the broad acceptance of the measures could be related to a socially founded understanding of freedom.

In the **symposium** *Covid-19 and States of Emergency*, TOM GERALD DALY uses a classification of governmental actions during the crisis to look at possible consequences for the development of democratic states, which could be very different throughout the cluster. LEONARDO COFRE reports on the situation in Chile, where the government's behaviour appears to be increasingly authoritarian and the constitutional referendum initiated as a result of the massive protests of recent months is threatened with renewed postponement beyond the period required by the pandemic. TANASIJE MARINKOVIĆ writes that the Serbian government has focused its actions mainly on its re-election, and in doing so has created a Machiavellian moment. In Romania, which is also holding national elections this year, fighting the crisis has produced a number of constitutional tensions, but minority government and parliamentary majority have also kept each other in check, concludes BIANCA SELEJAN-GUTAN. AHMED ELLABOUDY writes in his assessment of Egypt's response to the pandemic that despite its effectiveness in containing the virus, the concentration of power in the executive branch and the toothlessness of the other branches of government could pose a permanent threat to fundamental rights and the democratic process. In the Czech Republic, warns ZUZANA VIKARSKÁ, the crisis could, in addition to tensions in the relationship between the constitutional bodies, also cause problems with regard to the country's European integration. RAIT MARUSTE presents the Estonian government's strategy for coping with the crisis. LEDI BIANKU looks to Albania, where the response to the pandemic has been successful but well-known problems, particularly regarding access to legal protection, still persist. In Slovakia, a change of government took place in the early stages of the pandemic, which was accompanied by a series of mistakes by the new government with serious implications for fundamental rights, write SLAVOMÍRA HENČEKOVÁ and ŠIMON DRUGDA. No new threat to the rule of law in the country arises from the reaction of the Cameroonian government, analyses GATSI TAZO, as it is permanently endangered anyway. LUKMAN ABDULRAUF deals with the materially and procedurally problematic measures from a constitutional law perspective in Nigeria. In Malaysia, democracy, the rule of law and respect for fundamental rights are likely to be among the victims of the pandemic, writes RATNA RUEBAN BALASUBRAMANIAM, who sees the return of an

arbitrary rule by law in the country. JESÚS MARÍA CASAL HERNÁNDEZ and MARIELA MORALES ANTONIAZZI diagnose a renewed autocratic shift of an already authoritarian government in Venezuela during the crisis. Finally, ULADZISLAU BELAVUSAU and MAKSIM KARLIUK present an authoritarian *Sonderweg*, looking at Belarus, where the regime is not using its extensive power to fight the pandemic, but is trivialising the health threat and holding military parades in good old autocratic fashion.

So much for this week. Stay safe and healthy, and as a reminder: our Paypal account is paypal@verfassungsblog.de, our bank account is DE41 1001 0010 0923 7441 03, BIC PBNKDEFF, and our most loyal readers support us on Steady. Much appreciated!

All the best,

Max Steinbeis

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All the best, *Max Steinbeis*

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